LIBRARY
SUPREME COURT, U. S.

FILED
NOV 25 1964

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 255

THE AMERICAN SHIP BUILDING COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

WILLIAM B. BARTON
of
Vaughan, Brandlin, Robinson & Roemer
632 Shoreham Building
Washington, D. C. 20005
and
411 West Fifth Street
Los Angeles, California 90013

Attorney for
Chamber of Commerce of
United States as Amicus Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Introduction	1
The Question	2
Interest of Chamber of Commerce of United States	2
The Facts	4
The Reason for the Closedown	5
The Closedown Lawful	8
Legislative History	8
The National Labor Relations Board and Lockouts	11
No Unfair Motive in Closedown	13
Board Exceeded Authority	14
Conclusion	15
Appendix	19
Section 203 (c) National Labor Relations Act as amended (June 23, 1947)	19
Section 206 of Act	19
Section 208 of Act—in part	19
Section 8 (d) (4) of Act	20
Section 3 (a) of Act—in part	21
Section 3 (a) of Original National Labor Relations Act (July 5, 1935) in part	21

AUTHORITIES CITED

CASES:

American Brake Shoe Co., 116 N. L. R. B. 820, Enforcement denied 244 F. 2d 489 (C.A. 7 1957) 12

Associated Hat Manufacturers v. Baird-Unteidt Company, 88 Conn. 332 (1914) 9

Betts Cadillac Olds, Inc., 96 N. L. R. B. 268, 282 (1951) 11, 12

Page

Duluth Bottling Association, 48 N. L. R. B. 1335 (1943) 11
E Z Mills, 106 N. L. R. B. 1039 (1953) 8
Fibreboard Products Corp., petitioner v. N. L. R. B., Respondent, 375 U.S. 963 (1964) 13
Hobbs, Wall and Company, 30 N. L. R. B. 1027 (1941) .. 11
Hopwood Retinning Co., 4 N. L. R. B. 922 (1938) 11, 12
International Shoe Company, 93 N. L. R. B. 907 (1951) 11
Iron Moulders Union v. Allis-Chalmers Co., 166 F. 45, 50 (C.A. 7) (1908) 8
Lengel-Fencil Co., 8 N. L. R. B. 988 (1938) 11
Link-Belt Company, 26 N. L. R. B. 227, 261-264 (1940) 11
Local 357 Teamster Union v. N. L. R. B., 365 U.S. 667 (1961) 12
Morand Bros. Beverage Co. v. N. L. R. B., 190 F. 2d 576 (C.A. 7 1951), after remand 204 F. 2d 529 (C.A. 7 1953), cert. den. 346 U.S. 940 (1954) 12, 16
N. L. R. B. v. Anchorage Business Men's Assn., 289 F. 2d 619 (C.A. 9 1961) 12
N. L. R. B. v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949) 7
N. L. R. B. v. Dalton Brick & Tile Corp., 301 F. 2d 886 (C.A. 5 1962) 12
N. L. R. B. v. Hopwood Retinning, 98 F. 2d 97 (C.A. 2 1938) 11, 12
N. L. R. B. v. Insurance Agents, 361 U.S. 477, 490 (1960) 12, 16
N. L. R. B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345 (1938) 7
N. L. R. B. v. National Motor Bearing Co., 105 F. 2d 652 (C.A. 9 1939) 12
N. L. R. B. v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96, 97 (1957) 3, 4, 10, 12, 15
Pepsi Cola Bottling Co., 72 N. L. R. B. 601, 602 (1947) 13
Port Gibson Veneer & Box Co., 70 N. L. R. B. 319 (1946), enforced as modified 167 F. 2d 144 (C.A. 5 1948), cert. denied, 335 U.S. 819 (1948) 12
Quaker State Oil Refining Corp. v. N. L. R. B., 270 F. 2d 40 (C.A. 3 1959), cert. denied, 361 U.S. 917 (1959) 12
Renton News Record, 136 N. L. R. B. 1294 (1962) 8

Page

Salant & Salant, Inc., 66 N. L. R. B. 24 (1946) 12
Scott Paper Box Co., 81 N. L. R. B. 535 (1949) 11
Seaboard Packing Co., 107 N. L. R. B. 1295 (1954) 8
Williams Coal Co., 11 N. L. R. B. 579 (1939) 12
Worthington Creamery and Produce Co., 52 N. L. R. B. 121 (1943) 11

STATUTES:

Section 203 (c) of National Labor Relations Act, as amended 2, 10, 19
Section 206 of Act 2, 10, 19
Section 208 of Act 2, 10, 19
Section 306 of Act .....
Section 3 of original National Labor Relations (Wagner) Act 2, 21

OTHERS:

A Layman's Guide to Basic Law Under the National Labor Relations Act, Stuart Rothman, (one time) General Counsel of N. L. R. B. 14
Legality of Lockout, Prof. Robert F. Koretz, 4 Syracuse Law Review 249, 255 (1953) 8
Legislative History of Labor-Management Relations Act, Vol. 2, p. 1206 (1947) 10
Lockout as a Bargaining Weapon, 111 Univ. of Pa. Law Review 128 (1962) 3, 12
Lockouts Under the L. M. R. A., Prof. Bernard M. Meltzer, 28 Univ. of Chicago Law Review 614 (1956) 9
Organized Labor (1st ed.), Millis and Montgomery, p. 555 9
Policy Declarations of Chamber of Commerce of United States (1964-65) 4
Sen. 2926, 73rd Cong., 2nd Sess. 5 (1934) 2, 9
Single Employer and Multi-Employer Lockouts Under the Taft-Hartley Act, Prof. Meltzer, 24 Univ. of Chicago Law Review 70, 79 (1956) 12
The Duty to Bargain in Good Faith, Archibald Cox (then) Prof. of Law, Harvard Law School, 71 Harvard Law Review 1401, 1437 (1958) 15
Walsh, 79 *Congressional Record* 7673 10

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 255

THE AMERICAN SHIP BUILDING COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTRODUCTION

This brief amicus curiae is submitted in support of the Petitioner by the Chamber of Commerce of the United States pursuant to Rule 42 (2) of the Revised Rules of the Supreme Court. The matter comes before the Court pursuant to an order on October 12, 1964, allowing certiorari after a judgment of the United States Court of Appeals for the District of Columbia entered on April 9, 1964, affirming a National Labor Relations Board decision and order issued on June 21, 1963.

The judgment of the Court below was entered on April 9, 1964, and is reported in 331 F. 2d 938. The decision and

order of the National Labor Relations Board are reported in 142 N. L. R. B. 133.

This Court derives jurisdiction under 28 U. S. C. 1254 (1) and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 136.

The case involves directly Section 8 (d) (4) of the National Labor Relations Act as amended. It involves also Sections 203 (c), 206, 208 (a) and parts of Section 3 (a) both of said Act as amended and of the original National Labor Relations Act, 49 Stat. 449. These statutes are set forth in the Appendix.

THE QUESTION

The question before the Court, which is of very great concern to the Chamber of Commerce of the United States, hereinafter at times called amicus curiae, arises basically under Section 8 (d) (4) of the National Labor Relations Act as amended.[1] The question is whether the Act should be interpreted under the situation presented in this case to permit the lockout as a corollary of the right to strike.

INTEREST OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

The interest of the Chamber of Commerce of the United States in the question arises out of the obvious problem it presents to the Chamber's members. The Chamber is a federation with membership of more than 3700 State and local Chambers of Commerce and National and Local Trade Associations. It has an underlying membership of more than 4,000,000 business and professional firms and a direct membership of more than 31,000 business firms and business and professional people. Most of its members are employers in activities affecting commerce and are subject to federal labor laws. In this connection the right of

[1] This section of the Act is set out in the Appendix at page 20.

employees to strike has been quite fully elucidated both in the National Labor Relations Act itself and in National Labor Relations Board and Court decisions which have interpreted it. Section 13 of the Act, as amended, recites: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." On the other hand, although as later discussion shows, the Act recognizes the lockout, the circumstances under which employers may use it have been left in doubt. The Board's decisions in the area shift and are thus unpredictable[2]—perhaps because there are no standards for its guidance. When it holds a bargaining lockout illegal it tends to label the lock out an "offensive weapon", but when it holds one legal it tends to label it defensive in nature.[3] These labels completely fail to give reasonable certainty of results, but, it is submitted, are mere terms of convenience by which Board members or General Counsel for the Board subjectively conclude and urge that a specified lockout shall be struck down or upheld.

Employers are left in a quandry about the matter—being largely subject to the whim and caprice of the Board members, who are at times divided on the subject as in this case. This Court has indirectly recognized the problem, specifically observing in an earlier case before it that under the situation then presented it was "unnecessary to pass upon the question whether, as a general proposition, the

---

[2] The Board conceded in its brief when it argued *Truck Drivers Local Union* v. *N. L. R. B.* before the Circuit Court of Appeals (C.A. 2) that prior to such case "a majority of the Board had interpreted the Act as precluding the non-struck members of an employer unit from utilizing a lockout." 231 F. 2d 110, 113 (1956).

[3] See *Lockout as a Bargaining Weapon*, 111 Univ. of Pa. Law Review 128 (1962).

employer lockout is the corollary of the employee's statutory right to strike." [4]

The Chamber of Commerce of the United States urges on behalf of its members that to have this issue resolved would promote stability in management-labor relations. Long ago its members by a vote of their delegates assembled in the Chamber's Annual Meeting expressed the view that the right to lockout should be equated with the right to strike.[5] The problem has moreover been a topic of discussion at meetings of the Chamber's Labor Relations Committee. Hence this amicus curiae brief is presented because of the unresolved nature of the issue and because of its significance to members of the Chamber of Commerce of the United States.

THE FACTS

Amicus curiae emphasizes that the facts in the case before the Court present a not uncommon bargaining problem. Employers commonly confront a similar situation—impasse and frustration in bargaining after the employer has made every effort to arrive at an agreement, has committed no unfair labor practice and in consequence has scrupulously obeyed Section 8 (d) (4).

All the facts are not detailed here because petitioner has ably done that. Some of the highlights are outlined below, however, because they demonstrate the soundness and legality of the course pursued by the company.

---

[4] Footnote 19 in *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 93 (1957).

[5] See 1964-1965 Policy Declarations of Chamber of Commerce of the United States, p. 72, which states "The right to lockout should be equated with the right to strike."

THE REASONS FOR THE CLOSEDOWN

Actually plant operations had come to a virtual standstill by August 11th. The work on hand for customers had been completed and no new work was coming in. There were two causes of the work situation: (1) The Company deemed it unwise to take on new jobs in the face of the labor dispute that had developed. (2) The customers knew of the situation, having learned about it from various sources. Indeed Company spokesmen talked candidly to them about the unsatisfactory status of the labor dispute. Hence customers did not bring new repair jobs to the Chicago plant.[6]

These facts show that serious industrial realities confronted by the Company brought the closedown of August 11th. As a matter of sound business practice the Company wisely decided to close its Chicago plant.

There is substantial support for the trial examiner's findings "that Respondent was in a large measure motivated in discouraging orders and laying off its employees by its realistic appraisal of the economics of the situation."[7]

Furthermore, the employer had sound reason to close down on August 11th because of the bargaining situation.

As a cold collective bargaining proposition here are the salient facts confronted by the Company on the eve of its August 11th closedown:

(1) Twelve long and fruitless bargaining sessions. (R, p. 269.)[8]

---

[6] Transcript of Record, pp. 273-280. In referring to the page numbers the letters J A (Joint Appendix) which precede the page numbers in the Transcript of Record itself are omitted in this and other references which follow.

[7] Ibid, p. 280.

[8] R. in this and some of the following references again indicates the printed Transcript of Record in the case, the page numbers being given in each instance.

(2) A refusal by the union leaders to submit the last Company offer to the membership, and at the same time a failure to make a counteroffer. (R, p. 269.)

(3) The overwhelming rejection by the employees of an earlier offer. (R, p. 264.)

(4) A strike in connection with each of the contract negotiations since 1952 (R, p. 269.)

(5) An offer to extend the contract six months, thus fixing the contract's termination in the midst of the Company's busy season when a strike would hurt it most. (R, p. 263.)

(6) Another offer to extend the contract indefinitely, thus leaving the union free as in the proposed six months' extension to call a strike during the busy season or at any other advantageous time. (R, pp. 270-271.)

(7) Strike votes taken by locals during the bargaining. (R, p. 269.)

(8) A wildcat strike in the Chicago yard in February, 1961. (R. p. 283.)

(9) A tie-up of a customer's valuable vessel by a strike during the 1955 negotiations. (R, p. 302.)

(10) Oral assurances that there would be no strike, but failure to assure the Company "that the men would not strike if necessary." (R, p. 271.)

In the face of this fact situation the Company representatives would have shown themselves naive and unfaithful to the trust imposed in them by the Company had they placed full credence in the oral assurances of no strike. This is not to brand the union spokesman as dishonest. He could have been sincere and meant what he said. But obviously he could not speak with authority for the employees as demonstrated by the fact of a wildcat

strike earlier in the year and such a promise made in good faith today could in the same good faith be abandoned tomorrow for what might seem to the promisor or the employees to be completely good reasons.

Thus the Company not only was justified in closing down for business considerations, but had good reason to close in order to avoid placing itself at a great strategic disadvantage with the Union in bargaining.

Board counsel has argued that the employer has bargaining weapons that make use of the closedown unnecessary to protect its bargaining position. The Board in this connection mentions the employer right "to protect and continue his business by supplying places left vacant by strikers." *N. L. R. B.* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, 345 (1938). Board counsel also mentions employer freedom after a good faith bargaining impasse to institute unilaterally changes in employment terms that were rejected by the employees during negotiations. *N. L. R. B.* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217 (1949). Amicus curiae submits that although these two employer rights theoretically exist, their practical use presents great difficulties. To make replacements during a strike almost inevitably invites serious industrial warfare including picket line violence and a struggle to control the plant entrance. In addition it is always difficult and costly to train and put new employees to work. The step is especially a difficult and costly one if the replacements are likely to be used for only a short period of time. Similarly to make unilateral changes in the terms and conditions of employment invites trouble. By its very nature such action infuriates strong union proponents. It can thus gravely complicate problems with the union once bargaining is resumed.

THE CLOSEDOWN LAWFUL

The closedown of August 11, 1961, must be judged against the above background and was lawful whether effected for business reasons or to meet the bargaining developments.

Economic considerations as explained above were such that they could well have been the controlling motive of the Company in deciding to suspend its Chicago operations. To close an operation for such reasons is not an unfair labor practice.[9]

If it is assumed, however, that the closedown was effected as a weapon in the bargaining situation, it was nevertheless not an unfair labor practice but a lawful act.

In order for the closedown of August 11th to be proscribed under the National Labor Relations Act it would be necessary that it constitute unlawful conduct *per se* because no other conduct than the closedown itself is alleged or claimed to have been an unfair labor practice.

LEGISLATIVE HISTORY

The right of an employer to use the lockout was clearly embodied in common law and as a practical matter it was viewed as a corollary of the employees' right to strike. The common law concept was sufficiently broad to include discharge of employees for any reason whatever.[10] The right was viewed as something employers were free to exercise in concert and in fact an association member

---

[9] *E-Z Mills*, 106 N. L. R. B. 1039 (1953); *Seaboard Packing Co.*, 107 N. L. R. B. 1295 (1954); *Renton News Record*, 136 N. L. R. B. 1294 (1962).

[10] *Iron Moulders' Union* v. *Allis-Chalmers Co.*, 166 F. 45, 50 (C.A. 7 1908).

See also *Legality of Lockout*, Prof. Robert F. Koretz, 4 Syracuse Law Review 249, 255, (1953).

who failed to cooperate in lockout activities could be penalized.[11]

Events at the time Congress was considering the Wagner Act indicate that it purposely avoided making any specific change in the common law principle. Legislative history in fact indicates that Congress recognized and contemplated use of it when it enacted the original National Labor Relations Act, known as the Wagner Act, in 1935 and the Amendments of 1947, commonly called the Taft-Hartley Act. When Senator Wagner's original version of the Wagner Act was before Congress for Consideration, Section 5 (1) would have made it unfair labor practice for an employer "to attempt, by interference, influence, restraint, favor, coercion, or lockout, or by any other means to impair the right of employees guaranteed in Section 4."[12]

Thus, even though the original bill would have proscribed use of the lockout only to defeat protected activities, there were objections that such proscription was unfair inasmuch as the right to strike was protected. The subsequent bills introduced by Senator Wagner, including the version which became law, omitted express reference to lockouts.[13] This legislative history of the Wagner Act

---

[11] See *Associated Hat Manufacturers* v. *Baird—Unteidt Company*, 88 Conn. 332 (1914).

Also see *Organized Labor* (1st ed.) by Millis & Montgomery, p. 555.

[12] See Sen. 2926, 73rd Con., 2nd Sess. 5 (1934), See also *Lockouts under the L. M. R. A.*, Meltzer, 24 Univ. of Chicago Law Review, 70, 79 (1956).

[13] See Wagner Act, 49 Stat. 449 (1935). Commenting on the problem, Professor Meltzer says that "while this legislative history scarcely supports the right to resort to bargaining lockouts, it does foreclose the use of Section 13 as support for their proscription." cit. op. *supra* footnote 12.

indicates that Congress had no intentions of outlawing lockouts *per se.*[14]

The only specific references to the lockout were subsequently embodied in the 1947 Amendments of the National Labor Relations Act. Section 203 (c) for instance spells out the duties of the Director of the Federal Mediation and Conciliation Service as including efforts to obtain settlements of disputes without resorting to strike, lockout or other coercion. Section 206 makes the national emergency provisions applicable to both strikes and lockouts, and Section 208 specifies that the national emergency injunction shall be applicable to both strikes and lockouts.[15]

Section 8 (d) (4) imposes obligations on the respective parties not to strike or lockout during the bargaining period which follows notice by either of a desire to modify or terminate a contract. Indeed, this provision is the only one either in the original Wagner Act or in the Act as later amended which specifically proscribes in any way the use of the lockout. Accordingly, this quite limited proscription of its use is a strong indication that Congress at the time of the enactment of the National Labor Relations Act Amendments in 1947 saw no need to change the long recognized principle which gave validity to employer use of the lockout.

In all this recognition of lockouts, however, Congress has at no time set forth a statutory definition.

---

[14] *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, cit. *supra* footnote 4. See also 79 Congressional Record 7673, where Senator Walsh, as spokesman for the bill, in explaining it referred to "some fundamental rights an employer has." In describing them he said "No one can compel an employer to keep his factory open."

[15] See Legislative History of the Labor Management Relations Act, 1947, Vol. 2, p. 1206; also see appendix for exact wording of the statutory provisions mentioned in this and the next paragraph.

THE N. L. R. B. AND LOCKOUTS

The National Labor Relations Board, like Congress, has not defined the term "lockout". One of its trial examiners observed in the case of *Betts-Cadillac Olds, Inc.*, 96 N. L. R. B. 268, 282 (1951), that the Board "does not appear to have defined the term, and Board decisions do not reflect any consistent definition."[16]

Against this background the National Relations Board has assumed an implied authority to impose its own views about the use of the lockout. It may or may not uphold the lockout, the determination being made without benefit of standards for guidance, but rather being based on the

---

[16] The same trial examiner referred in this case to the following "widely separated" concepts of the lockout as having been used by the Board:

A closedown to avoid property loss, *Duluth Bottling Association*, 48 N. L. R. B. 1335 (1943);

A closedown because of the effect of sporadic strikes, *International Shoe Company*, 93 N. L. R. B. 907 (1951);

A closedown in a fit of employer temper in arguing with union representative, but with no anti-union purpose, *Lengel-Fencil Co.*, 8 N. L. R. B. 988 (1938);

Mass discharges as a reprisal against union activity, *Hopwood Retinning Co.*, 4 N. L. R. B. 922 (1938), *Scott Paper Box Co.*, 81 N. L. R. B. 535 (1949).

This trial examiner also pointed out in the case of Betts-Cadillac Olds, Inc. that in certain cases shutdowns for economic consideration have not been termed lockouts, referring as examples to *Link-Belt Co.*, 26 N. L. R. B. 227, 261-264 (1940); *Hobbs, Wall and Company*, 30 N. L. R. B. 1027 (1941); *Worthington Creamery & Produce Co.*, 52 N. L. R. B. 121 (1943). He observes that "the decisions reflect no invidious connotation in use of the term", mentioning the *Duluth Bottling Association, International Shoe Company* and *Lengel-Fencil Company cases* as lockouts found to be legal. He cites the *Hopwood Retinning Co.* and *Scott Paper Box Co. cases* as examples of ones found illegal.

opinions of Board members as to whether the employer is entitled to use it for defensive purposes.[17]

In upholding a lockout this Court recognized the distinction between the one it found lawful and those in another group that had been held unlawful. The Court observed:

> "We are not concerned here with the cases in which the lockout has been held unlawful because designed to frustrate organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain."[18]

---

[17] Among cases illustrative of such Board decisions are *N. L. R. B.* v. *Dalton Brick & Tile Corp.*, 301 F. 2d 886 (C.A. 5 1962); *Morand Bros. Beverage Co.* v. *N. L. R. B.*, 190 F. 2d 576 (C.A. 7 1951); *Betts Cadillac Olds, Inc.* cit. *supra* p. 11; *American Brake Shoe Co.*, 116 N. L. R. B. 820, enforcement denied, 244 F. 2d 489 (C.A. 7 1957); *N. L. R. B.* v. *Truck Drivers Local etc.* cit. footnote 4 *supra*; *N. L. R. B.* v. *Insurance Agents Intl. Union*, 361 U.S. 477 (1960); *Local 357 Teamster Union* v. *N. L. R. B.*, 365 U.S. 667 (1961). For a discussion of the point see *Lockout as a Bargaining Weapon*, cit. footnote 3 supra.

[18] *N. L. R. B.* v. *Truck Drivers Local Union No. 449*, cit. footnote 4 *supra*. For illustrations of lockouts found illegal for reasons similar to those mentioned by the Court see: *N. L. R. B.* v. *National Motor Bearing Co.*, 105 F. 2d 652 (C.A. 9 1939); *Salant & Salant, Inc.*, 66 N. L. R. B. 24 (1946); *Port Gibson Veneer & Box Co.*, 70 N. L. R. B. 319 (1946), enforced as modified, 167 F. 2d 144 (C.A. 5 1948), cert. denied, 335 U.S. 819 (1948); *Williams Coal Co.*, 11 N. L. R. B. 579 (1939); *N. L. R. B.* v. *Hopwood Retinning Co.*, 98 F. 2d 97 (C.A. 2 1938); *N. L. R. B.* v. *Anchorage Business Men's Assn.*, 289 F. 2d 619 (C.A. 9 1961); *Quaker State Oil Refining Corp.* v. *N. L. R. B.*, 270 F. 2d 40 (C.A. 3 1959), cert. denied, 361 U.S. 917 (1959). See also Article mentioned footnote 12 *supra* in 24 Univ. of Chicago Law Review 70, 72 (1956) by Prof. Bernard D. Meltzer in which he states:

> "These cases involve lockouts designed to frustrate organizational efforts, to destroy or undermine the bargaining representative or to evade the duty to bargain. In such situations the basic vice is not the lockout as such, but the fact that its purpose is plainly incompatible with the rights to organize or to bargain collectively, which are protected by the Statute. These illicit lockouts are plainly distinguishable from the bargaining lockout."

The Board itself has definitely recognized that the employer, in the absence of a purpose to evade bargaining and defeat its employees' union activity, is free to close down its operations. It has stated: "We recognize that an employer may lawfully discontinue or reduce operations for any reason whatsoever, good or bad, sound or unsound, in its sole discretion, and without censorship from this Board, *provided only that the employer's action is not motivated by a purpose to interfere with and defeat its employees' union activities.*"[19]

NO UNFAIR MOTIVE IN CLOSEDOWN

The Company in the case before the Court complied with Section 8 (d) (4). The background of the August 11th, 1961, lockout as disclosed by the record and as outlined above shows clearly moreover that the closedown was not motivated by a desire to avoid bargaining or to destroy unionization. The facts support the exact opposite conclusion. There is complete lack of any unfair labor practice background, so much so that no unfair labor practices independent of the lockout of August 11th are even alleged. The entire case rests on the proposition that the closedown itself constituted a violation of portions of the Act.

Affirmatively the facts show that the employer during the entire 1961 series of event constantly bargained in good faith as it had done with the same unions since 1952. Indeed, Chairman McCulloch and Board Member Rogers in their dissent point out that "it was Respondent who requested the early opening of contract negotiations so that timely agreement might more easily be reached.[20] Amicus

---

[19] *Pepsi Cola Bottling Co.*, 72 N. L. R. B. 601, 602, (1947). It is submitted that the principle thus stated, moreover, is sound and will continue of necessity to be basically sound whether modified or not as a result of the decisions in *Fibreboard Products Corp., Petitioner*, v. *N. L. R. B., Respondent*, (cert. granted) 375 U.S. 963 (1964), and other cases now pending.

[20] R. 301.

curiae emphasizes that the employer proceeded as the negotiations moved forward, to observe faithfully the obligations imposed by Section 8 (d) (4) of the Act. During the two months prior to the closedown it engaged in more than twelve bargaining sessions with the union. The trial examiner found that sometimes these sessions lasted into the early hours of the following morning.[21] The employer continued to bargain even though the employees overwhelmingly rejected an offer made by it on July 31st. It made a further offer in a meeting on August 9th, but the negotiators for the union rejected it and did not even submit it to the employees.[22]

BOARD EXCEEDED AUTHORITY

The N. L. R. B in declaring the closedown of August 11th unlawful was under the circumstances of the case assuming powers not granted by Congress.

The Board powers are clearly derived from statute, it having been created by Section 3 of the National Labor Relations Act in 1935 and continued under Section 3 (a) of the Act as amended in 1947.[23]

It is fundamental under its statutory authority that the Board together with its General Counsel and its trial examiners does two things: (1) it determines questions of representation, holding elections when necessary to make such determinations; and (2) it decides cases involving charges of unfair labor practices.[24]

The Board relies on a claimed need to balance conflicting interests as a reason for the authority assumed in rend-

---

[21] R. 269.

[22] Ibid.

[23] See Appendix.

[24] See N. L. R. B. publication, "*A Layman's Guide to Basic Law under the National Labor Relations Act*, by Stuart Rothman (at the time) General Counsel of the N. L. R. B.

ering the decision made by it in this case. In its brief before the U. S. Court of Appeals for the District of Columbia, it states that (referring to situations where employer's conduct in lockout cases has been found lawful): "They entail in effect a balancing of these conflicting interests—a determination in particular situations whether the employer interest involved requires that his action be privileged even though it results in some sacrifices of employee rights. It is precisely this kind of balancing that the the Board employs to determine whether or not lockouts are lawful." The Board cites as authority *N. L. R. B.* v. *Truck Drivers Union Local Union No. 449.*[25]

CONCLUSION

Doubtless, the Board at times feels strongly that it should impose this or that rule of law even though lacking statutory authority. In examining the question of bargaining in good faith the Board, for instance, has shown an inclination to ban certain practices that it deems show a contrary purpose. The Board in this connection has at times so acted regarding slowdown and quickie strikes. It has been suggested in discussing this Board practice that "it is not enough for the N. L. R. B. to express its moral judgment or even community sentiments. To say 'there ought to be a law against it' does not demonstrate the propriety of the N. L. R. B.'s imposing the prohibition."[26]

Regarding the Board's efforts similarly to regulate the choice of economic weapons to be used this Court has said:

> "Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if

---

[25] Cited *supra*, footnote 4.

[26] *The Duty to Bargain in Good Faith*, Archebald Cox (then) Prof. of Law, Harvard Law School, 71 Harvard Law Review 1401, 1437 (1958).

> the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results in negotiations. See S. Rep. No. 105, 80th Cong., 1st Sess., p. 2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union."[27]

In the case of *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, cit. *supra* footnote 17, the Court of Appeals, specifically mentioning Section 8 (d) (4), referred to the lockout as "a corollary of the union's right to strike. Consequently, once petitioners had exhausted the possibilities of good faith collective bargaining with the Union through their Associations, any or all of them were free to exercise their right to lock out their salesmen without waiting for a strike. just as the Union was free to call a strike against any or all of them."

The principle there stated is sound. The case was one of group bargaining. No good reason is apparent why it does not apply with equal force, or at times with more force, in cases where a single employer copes with a powerful union or group of unions.[28]

In the case before the Court amicus curiae emphasizes that there is nothing whatever in the record to show union

---

[27] *N. L. R. B.* v. *Insurance Agents*, cit. *supra* footnote 17.

[28] A remand and ultimate finding against the employer of course took place in the *Morand case*, 204 F. 2d 529 (C.A. 7 1953), cert. denied, 346 U.S. 909 (1953), rehearing denied 346 U.S. 940 (1954). The result was largely because of a finding that the salesmen had been discharged, not laid off Hence the final decision was consistent with the principle set forth above

animosity on the part of the employer—nothing to show a purpose to destroy the union or evade bargaining. Section 8 (4) (d) was scrupulously observed. There had been good faith bargaining with the unions involved since 1952.

As a matter of fact a decision in this case that the employer cannot use the lockout would in practical effect completely proscribe its use by a single employer for most bargaining purposes.

By oral assurances of no strike, the union representative could forestall employer self-help by a closedown. He could continue this situation to his own liking and in turn the union could precipitate a strike crisis on the employer when it would be most disastrous to the business. Employers large and small would stand helpless to protect themselves. The result would be especially unjust to employers such as the petitioner, who have an exemplary record of bargaining with unions.

Few employers would have the temerity to challenge the rule, not only because of the costliness of litigation but also because of likely sizeable back-pay awards.

To state the result another way there would be a complete and unfair imbalance in bargaining. Unions would continue to be broadly protected in using the strike as a bargaining device, but employers even though completely free from a record of unfair labor practices would be foreclosed from using the lockout for the same purpose.

The employer in the case at hand had as much right to effect the closedown of August 11, 1961, as the union had to strike. Amicus curiae respectfully submits that this Court should so determine; that it further should deny enforce-

ment and set aside the National Labor Relations Board order in the matter dated June 21, 1963.

WILLIAM B. BARTON
of
Vaughan, Brandlin, Robinson & Roemer
632 Shoreham Building
Washington, D. C. 20005
and
411 West Fifth Street
Los Angeles, California 90013

Attorney for
Chamber of Commerce of
United States as Amicus Curiae

APPENDIX

Relevant Sections of National Labor Relations Act as Amended (June 23, 1947) 61 Stat. 136

Section 203 (c):

> If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

Section 206:

> Wherever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall make its contents available to the public.

Part of Section 208 (a):

> Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having juris-

diction of the parties to enjoin such strike or lockout or the continuing thereof .....

Section 8 (d) (4)

(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

.....

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a

contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the six-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Part of Section 3 (a)

The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States . . . . . .

. . . . . .

Part of Section 3(a) of Original National Labor Relations Act (July 5, 1935) 49 Stat. 449

There is hereby created a Board, to be known as the "National Labor Relations Board (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate

. . . . . .